No. 02-241 (63)

Supreme Court, U.S.
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In The
Supreme Court of the United States

BARBARA GRUTTER,

Petitioner,

vs.

LEE BOLLINGER, JEFFREY LEHMAN, DENNIS SHIELDS, and the BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN, *et al.*,

Respondents,

and

KIMBERLY JAMES, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR THE BAY MILLS INDIAN COMMUNITY, GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS, HANNAHVILLE INDIAN COMMUNITY, KEWEENAW BAY INDIAN COMMUNITY, LAC VIEUX DESERT BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, LITTLE RIVER BAND OF OTTAWA INDIANS, LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS, MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS OF MICHIGAN, NOTTAWASEPPI HURON BAND OF POTAWATOMI, ONEIDA TRIBE OF INDIANS OF WISCONSIN, SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS, AND MICHIGAN INDIAN LEGAL SERVICES, AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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INTEREST OF *AMICI*[1]

Amici Bay Mills Indian Community, Grand Traverse Band of Ottawa and Chippewa Indians, Hannahville Indian Community, Keweenaw Bay Indian Community, Lac Vieux Desert Band of Lake Superior Chippewa Indians, Little River Band of Ottawa Indians, Little Traverse Bay Bands of Odawa Indians, Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan, Nottawaseppi Huron Band of Potawatomi, and Sault Ste. Marie Tribe of Chippewa Indians, are federally recognized Indian tribes located in the State of Michigan. *See* Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 67 Fed. Reg. 46,328 (July 12, 2002). *Amicus* Oneida Tribe of Indians is a federally recognized tribe located in the State of Wisconsin, and *Amicus* Michigan Indian Legal Services ("MILS") is a non-profit organization providing civil legal services to low-income Indians and tribes in Michigan to further self-sufficiency, overcome discrimination, and assist tribal governments. Except for MILS, *Amici* are "domestic dependent nations," possessing all "aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *United States v. Wheeler*, 435 U.S. 313, 323 (1978). As a result, they operate modern governments with complex legal, political and business interests on reservations within the State of Michigan.

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than *Amici* or their counsel, made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief.

The *Amici*'s interest in this case is substantial. In 1817, "believing they may wish some of their children hereafter educated," several of the *Amici* provided a land grant to the University of Michigan ("the University") in the Treaty of Fort Meigs. *See* Treaty between the Wyandot, Seneca, Delaware, Shawanese, Potawatomees, Ottawas, and Chippeway Nations and the United States, Sept. 29, 1817, art. 16, 7 Stat. 160, 166. This land grant formed a significant portion of the University's original endowment.

The tribal leaders who signed the Fort Meigs Treaty had the foresight to recognize that educating their children and future leaders was essential to coping with the increasingly complex problems confronting their tribes. Indeed, today the *Amici* recruit Native American[2] students at the University of Michigan Law School ("the Law School") to draft and enforce tribal laws, staff tribal courts and law enforcement programs, and defend tribal rights and resources. If the Law School were forbidden from considering race[3] in its admissions decisions, the number of Native American students would decrease to token levels, *see* JA 7528-32, and the purpose of the Treaty of Fort Meigs would be frustrated. Furthermore, if other law schools were similarly prevented from considering race in admissions decisions, the *Amici* would be unable to fill

[2] The terms "Native American" and "Indian" are used interchangeably throughout this brief.

[3] As the Law School's policy is not based on tribal membership *per se*, the principles of *Morton v. Mancari*, 417 U.S. 535 (1974) are not squarely implicated in this case, and no party has raised or briefed those principles in this Court or in the courts below.

important governmental positions with qualified candidates, therefore impeding the *Amici*'s ability to exercise their sovereign authority and undermining the federal government's policy of self-determination for all Indian tribes.

Finally, the *Amici* believe that if law schools were prevented from considering race in admissions decisions, the numbers of Native American students would decline substantially. Without interaction with Native American students, the vast majority of law students would graduate with little or no exposure to Native American culture or modern tribal governments. This would leave students ill-equipped to identify legal issues involving Indian tribes and would stifle cooperation between federal, tribal and state governments. Accordingly, *Amici* add their collective voice in support of the Law School admissions policy.

ARGUMENT

One of the University of Michigan's founding missions was the education of Native American students. In 1817, the Chippewa, Ottawa or Odawa, and Potawatomi Nations[4] gave the recently formed University of Michigania a land grant of 3,840 acres in the Treaty of Fort Meigs.

[4] Chippewa or Chippeway, Odawa or Ottawa and Potawatomi, Potawatomees, or Potawatomy are spelled differently in various written sources. Since the Indian languages of these three peoples originally were oral languages, there is no single correct spelling. We use here the spelling currently preferred by each tribe, rather than the spelling employed in the Treaty of Fort Meigs.

Treaty between the Wyandot, Seneca, Delaware, Shawanese, Potawatomees, Ottawas, and Chippeway Nations and the United States, Sept. 29, 1817, art. 16, 7 Stat. 160, 166 (hereafter "Treaty of Fort Meigs"); Howard H. Peckham, *The Making of the University of Michigan 1817-1992* 8 (Margaret L. Steneck & Nicholas H. Steneck eds., 1994). This land grant was given for the express purpose of educating Native American children. *Id.* The University of Michigania eventually became the University of Michigan, and the land grant from the Treaty of Fort Meigs formed a significant portion of the University's original endowment. Peckham, *supra*, at 12-13.

The University of Michigan first acknowledged the importance of the Treaty of Fort Meigs by granting five scholarships to Native American students in 1932, and then again, in 1936. Peckham, *supra*, at 13, 21. Beginning in the 1970s, however, increased Native American activism encouraged the University to more fully honor the original purposes for which it was created. Upon becoming reacquainted with its unique history, the University of Michigan sought to increase educational opportunities for Native American students, and did so in part by including Native American applicants within its affirmative action program.[5] Even if the consideration of Native American status were afforded the strictest scrutiny, the Law School's program would be constitutional.

[5] Since the 1970s, the Law School has utilized several different affirmative action policies. The policy being challenged in this case was adopted by the Law School faculty on April 24, 1992.

I. THE STATE OF MICHIGAN HAS A COMPELLING INTEREST IN EDUCATING NATIVE AMERICAN STUDENTS

This Court has previously held that "a properly devised admissions program involving the competitive consideration of race and ethnic origin" is permitted under the Fourteenth Amendment. *Regents of the University of California v. Bakke*, 438 U.S. 265, 320 (1978). Although there is disagreement about the level of scrutiny such a program should receive, and *Amici* certainly do not concede that the highest level of scrutiny applies, the Law School's admissions program is constitutionally permissible even under the Court's strictest approach, *i.e.*, that to be considered "properly devised," the admissions program must be supported by a "compelling governmental interest," *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 485 (1989), or an interest that "is both constitutionally permissible and substantial." *Bakke*, 438 U.S. at 305.

The State of Michigan has a compelling interest in educating Native American students because: (1) one of the original missions of the University of Michigan was to educate Native American students, (2) the federal government has delegated much of its responsibility for Native American education to the states, including the State of Michigan, and (3) tribal and state governments share both citizens and neighboring geographic space, and therefore, Michigan has an interest in assuring effective governance on Indian reservations, which is greatly enhanced by an educated tribal citizenry.

A. One Of The Original Missions Of The University Of Michigan Was To Educate Native American Students

The history of the founding of the University of Michigan demonstrates that it was created in part to educate Native American students. Prior to the University's founding, the Chippewa, Ottawa or Odawa, and Potawatomi Tribes of Michigan (hereafter sometimes referred to as the "Michigan Indian tribes") had developed a productive relationship with a Catholic missionary named Father Gabriel Richard. Father Richard established and began operating an Indian school at Spring Hill in 1808. Unfortunately, the school encountered financial difficulties and was forced to close in 1811. The Michigan Indian tribes, however, were so impressed by Father Richard's efforts to start an Indian school, that they, realizing the importance of education for the future generations of their tribe decided to assist in the formation of a college in or near Detroit. *See Children of the Chippewa, Ottawa and Potawatomy Tribes v. The Regents of the University of Michigan*, 305 N.W.2d 522, 529 (Mich. Ct. App. 1981).

On August 26, 1817, Father Richard, Reverend Monteith, Lewis Cass and a small group of other leaders in the Detroit area banded together to form a new college, the Catholepistemiad or University of Michigania.[6] *Children of the Chippewa, Ottawa and Potawatomy Tribe*, 305 N.W.2d at 531. Shortly thereafter, the Chippewa, Ottawa or Odawa and Potawatomi Nations of Michigan entered

[6] It is believed the University was established at this time for the purpose of becoming eligible to receive the land grant offered by the Michigan Indian tribes. Peckham, *supra*, at 8.

into the Treaty of Fort Meigs with the United States, which contained a specific grant of land to the new college:

> Some of the Ottawa, Chippewa, and Potawatomy tribes . . . believing they may wish some of their children hereafter educated, do grant . . . to the corporation of the college at Detroit, for the use of the said college, to be retained or sold, as the . . . corporation may judge expedient, each, one-half of three sections of land, to contain six hundred and forty acres, on the river Raisin, at a place called Macon; and three sections of land not yet located, which tracts were reserved, for the use of the said Indians, by the treaty of Detroit, in one thousand eight hundred and seven; and the superintendent of Indian affairs, in the territory of Michigan, is authorized, on the part of said Indians, to select the said tracts of land.

7 Stat. at 166. From the plain text of the grant, the Michigan Indian tribes offered the land "believing they may wish some of their children hereafter educated." *Id.*

The University of Michigania was soon renamed the University of Michigan. The lands granted to the University in the Treaty of Fort Meigs were sold, and a portion of the proceeds were used to purchase the University's campus in Ann Arbor, Michigan. Peckham, *supra*, at 12-13. The remaining proceeds from the sale provided a significant portion of the University of Michigan's original endowment. Indeed, Justice Thomas Cooley once stated that the land grant contained in the Treaty of Fort Meigs was actually equal in positive value and prospectively superior to the land gifts of John Harvard and Elihu Yale.

A University Between Two Centuries: The Proceedings of the 1937 Celebration of The University of Michigan 41 (Wilfred B. Shaw ed., 1937).[7]

This history demonstrates that one of the founding missions of the University of Michigan was education of Native American students. In this way, the University of Michigan's mission is similar to that of Harvard University, whose 1650 Charter called for the "education of English and Indian youth," or the missions of Dartmouth College and the College of William & Mary, which also specifically mentioned education of Native Americans.[8]

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[7] The University continues to acknowledge the importance of the Fort Meigs Treaty today. A bronze plaque commemorating the treaty is located at the center of the University of Michigan campus and reads:

> This plaque commemorates the grant of lands from the Ojibwe (Chippewa), Odawa (Ottawa), and Bodewadimi (Potawatomi), through the Treaty of Fort Meigs, which states that "believing they may wish some of their children hereafter educated, [they] do grant to the rector of the Catholic church of St. Anne of Detroit . . . and to the corporation of the college at Detroit, for the use of the said college, to be retained or sold, as the said rector and corporation may judge expedient. . . ." The rector was Gabriel Richard, a founder and first vice president of the corporation of the college, chartered by the territorial legislature as the University of Michigania in 1817. These lands were eventually sold to the benefit of the University of Michigan, which was relocated to Ann Arbor in 1837.

Judy Steeh, Plaque honors land gift from three Native American tribes, The Univ. Record Online, Nov. 18, 2002, *at* http://www.umich.edu/~urecord/0102/Nov18_02/16.shtml.

[8] To discharge its original mission of educating Indians, Harvard University not only includes Indians in its affirmative action programs, but has founded the Harvard University Native American Program, the history and description of which can be found at http://www.ksg.harvard.edu/hunap/about.html. Similarly, Dartmouth College recruits

(Continued on following page)

Although no one knows when the University of Michigan admitted its first Native American student, *see* Steeh, *supra* (quoting University historian Margaret Steneck), the University did grant five scholarships to Native American students in 1932, and then again in 1936, in recognition of the Treaty of Fort Meigs. Peckham, *supra*, at 13, 21.

In the 1970s, the University of Michigan began to make its first extensive efforts to facilitate the education of Native American students by including them in programs to diversify the student body.[9] Today, the Law School seeks to discharge its founding mission by specifically including Native Americans in its affirmative action admissions policies. The University's unique and historic interest in honoring the spirit of the Treaty of Fort Meigs is a sufficiently compelling interest to survive strict scrutiny under the Fourteenth Amendment.

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and admits Indians into its fine Indian studies program. The history of Dartmouth College is set forth at http://www.dartmouth.edu/about/history.html, and in more detail, in *First Person, First Peoples: Native American College Graduates Tell Their Life Stories* 7-15 (Andrew Garrod & Colleen Larimore eds., 1997). The history of the Charter of the College of William & Mary can be found at http://www.swem.wm.edu/SpColl/Archives/Charter/charterstory.html.

[9] On August 5, 1971, Paul Johnson, a Native American graduate student at the University of Michigan, brought an action against the University, arguing that the land grant contained in the Treaty of Fort Meigs created a trust, of which the children of the Chippewa, Ottawa, and Pottawatomy Tribes were the beneficiaries, and imposed on the University a duty to ensure their free education. *Children of the Chippewa, Ottawa and Potawatomy Tribe*, 305 N.W.2d at 523-24. Even though the court found no judicially enforceable trust was created by these land grants, the case prompted the University to take additional steps to fulfill its original mission.

B. The Federal Government Has Promoted Special Educational Programs For Native American Students Since This Nation's Founding, And Responsibility For Many Of These Programs Has Been Delegated To The States, Including The State Of Michigan

Article 16 of the Treaty of Fort Meigs was unique in that the Chippewa, Ottawa or Odawa, and Potawatomi Nations granted land to a specific university to ensure their children would be educated in the future. It was not at all unusual, however, for the United States to include general promises to provide education to Native Americans in Indian treaties. *See* Vine Deloria, Jr., *Legislative Analysis of the Federal Role in Indian Education* 39-73 (1974) (collecting treaties). Indeed, in addition to the Treaty of Fort Meigs, the Chippewa, Ottawa or Odawa, and Potawatomi Nations entered into more than twenty treaties with educational provisions.[10] For example, Article 3 of the

[10] *See e.g.*, Treaty between the Ottawa, Chippewa, and Pottawatamie Nations and the United States, Aug. 29, 1821, art. 4, 7 Stat. 218, 220; Treaty between the Chippewa Tribe and the United States, Aug. 5, 1826, art. 6, 7 Stat. 290, 291; Treaty between the Pottawatamie Nations and the United States, Oct. 16, 1826, art. 3, 7 Stat. 295, 296; Treaty between the Chippewa, Menomonie, and Winebago Tribes and the United States, Aug. 11, 1827, art. 5, 7 Stat. 303, 304; Treaty between the Potowatomi Tribe and the United States, Sept. 20, 1828, art. 2, 7 Stat. 317, 317-18; Treaty between the Potowatomies and the United States, Oct. 27, 1832, art. 4, 7 Stat. 399, 401; Treaty between the Ottawa and Chippewa Nations and the United States, March 28, 1836, art. 4, 7 Stat. 491, 492; Treaty between the Chippewa Nation and the United States, Jan. 14, 1837, art. 3, 7 Stat. 528, 529; Treaty between the Chippewa Nation and the United States, Oct. 4, 1842, art. 4, 7 Stat. 591, 592; Treaty between the Ottawa and Chippewa Nations and the United States, July 31, 1855, art. 1 & art. 2, 11 Stat. 621, 623.

September 26, 1833 Treaty between the Chippewa, Ottawa, and Potawatomi Nations and the United States provided that:

> And in further consideration of the above cession, it is agreed, that there shall be paid by the United States . . . Seventy thousand dollars for purposes of education and the encouragement of the domestic arts, to be applied in such manner, as the President of the United States may direct . . . .

7 Stat. 431, 432-33 (1833).

A Congressional report issued in 1818 demonstrates that the federal government initiated special Native American education programs as a means of promoting more effective intergovernmental relations with Indian tribes and advancing its own Indian policy objectives:

> The committee believes that . . . establishing schools on or near our frontier for the education of Indian children, would be attended with beneficial efforts both to the United States and the Indian tribes, and the best possible means of securing the friendship of those nations in amity with us, and, in time, to bring the hostile tribes to see that their true interest lies in peace, and not in war . . . .

H.R. Rep. No. 151, 15th Cong., 1st Sess., Jan. 22, 1818, *in* II American State Papers: Indian Affairs 151.[11] The federal

[11] Of course, one of these objectives was to "civilize" the Indians by encouraging them to become farmers in the hopes that they would settle down on small plots of land, thereby freeing up additional areas for white settlement.

trust responsibility to educate Native Americans arose out of these early treaties and federal policies, and continues in force today. 20 U.S.C. § 7401 ("It is the policy of the United States to fulfill the Federal Government's unique and continuing trust relationship with and responsibility to the Indian people for the education of Indian children."); Exec. Order No. 13,096 (Aug. 6, 1998) ("The Federal Government has a special, historic responsibility for the education of American Indian and Alaska Native students"). *See generally* Mary Christina Wood, "Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited," 1994 Utah L. Rev. 1471, 1495-1508. Over the past two hundred years, however, the federal government has chosen to fulfill this trust responsibility through a variety of different policies.

At first, Native American education remained largely within the auspices of the church. In 1819, Congress passed legislation that created a permanent annual appropriation of ten thousand dollars to support Native American education. Act of March 3, 1819, ch. 851, § 2, 3 Stat. 516, 517. This "civilization fund" distributed money to churches and missionary organizations that created schools for Native American students, *see* Felix S. Cohen, *Handbook of Federal Indian Law*, 680, n.13 (Rennard Strickland et al., eds., 1982), and annual appropriations from the fund continued until the act was repealed in 1873. Act of Feb. 14, 1873, ch. 138, § 1, 17 Stat. 437, 461. Still, the majority of education funding in the first half of the nineteenth century was provided by the tribes themselves, and religious organizations. For example, between 1845 and 1855, the federal government appropriated $102,000 for Native American education, while the tribes provided $400,000 and an additional $824,000 from treaty

appropriations in consideration for land cessions, and private sources (e.g., religious organizations) contributed $830,000. Cohen, *supra*, at 680 (citing Sen. Exec. Doc. No. 1, 34th Cong., 1st Sess., pt.1, at 561 (1855)).

In the 1880s, perhaps dissatisfied with the rate of assimilation, congressional funding increased, and the federal government began building its own boarding schools to educate Native American youth. Many of these boarding schools were located off-reservation, because a key component of this scheme was separating children from their families and communities so that their way of life could be changed more rapidly and thoroughly. *See generally* Frederick E. Hoxie, *A Final Promise: The Campaign to Assimilate the Indians, 1880-1920* 41-187, 189-210 (1984) (discussing the boarding school movement); David H. DeJong, *Promises of the Past: A History of Indian Education in the United States* 107-109, 116 (1993). These boarding schools were attended by Native American students from many different tribes, without regard to specific treaty provisions. Cohen, *supra*, at 680. Additionally, by the early 1900s, the Bureau of Indian Affairs had developed several hundred day schools, and a uniform curriculum for all federal Indian schools was implemented. Cohen, *supra*, at 681.

Federal policy shifted once again in the 1930s, when the government chose to cut back on its direct provision of educational services to Native Americans and to rely, instead, primarily on states to discharge its special Indian education policies. The Johnson O'Malley Act of 1934, 48 Stat. 596, *codified as amended at* 25 U.S.C. §§ 452-458e, authorized the Secretary of the Interior to make contracts with any state "for the education, medical attention, agricultural assistance and social welfare . . . of Indians."

25 U.S.C. § 452. The law provided states with federal money to educate eligible Native American children in their public school system. In the years that followed, Congress would enact additional legislation providing state funding for Native American education. *See, e.g.*, The Impact Aid Law of 1950, Act of Sept. 30, 1950, ch. 1124, 64 Stat. 1100 (authorizing federal payments to state public schools serving Native American students residing on Indian trust lands that are exempt from state property taxation); Indian Education Act of 1972, Pub. L. No. 92-318 (providing special federal funding to state schools for Indian education and greater input by Indian parents into discretionary programs funded under the legislation).

During this same time period, state involvement in Native American education was even more pronounced in Michigan. In the early 1900s, the federal government operated nine Indian day schools,[12] and at least one off-reservation boarding school, the Mount Pleasant Indian Industrial School, in Michigan. The Mount Pleasant Indian Industrial School was founded in 1891, when Congress appropriated $25,000 for the purchase of 200 acres of land to develop an Indian school in Isabella County, Michigan. The school served approximately 375 students from 1920 to 1933. Reinhardt, *supra*, at 43, 45-46. In 1934, however, the federal government shut down

[12] The Bureau of Indian Affairs operated the following day schools in Michigan: the Garden Island Day School, the Nawbetung Day School, the Longwood Day School, the Chippewa Day School, the Neppessing Day School, the Hannahville Indian Mission Day School, the L'Anse Indian Mission Day School, and the Sugar Island Indian Day School. Martin J. Reinhardt, Master of Arts Thesis, Central Michigan University, 43, 49 (1998).

the Mount Pleasant Indian Industrial School and sold the school property to the State of Michigan for one dollar. In exchange, Michigan agreed to educate Native Americans within the State in its public schools, without cost to the federal government. 48 Stat. 353 (1934); William Comstock, Letter to Secretary of the Interior, Honorable Harold L. Ickes (May 28, 1934).

The federal government believed that this agreement, commonly known as the Comstock Agreement, constituted a complete delegation of the federal responsibility to educate Native American children residing in Michigan to the State of Michigan.[13] Special Subcommittee on Indian Education of the Senate Commission on Labor and Public Welfare, Indian Education: A National Tragedy – A National Challenge, S. Rep. No. 501, 91st Cong. Sess. XII (1969) (hereinafter referred to as "National Tragedy") (noting that "the education of Indian children in California, Idaho, *Michigan*, Minnesota, Nebraska, Oregon, Texas, Washington, and Wisconsin was the total responsibility of the State and not the Federal Government") (emphasis added). As a result, by 1952, the Bureau of Indian Affairs had closed all of the federal Indian schools in Michigan. *Id.* at 14.

Because the Comstock Agreement completely compensated the State of Michigan for its assumption of Native American education, Michigan was not entitled to funds

[13] This belief was based in part on the fact that the State had already been required to provide equal educational opportunities to Native American students since at least 1924, when Native Americans became United States citizens. 43 Stat. 253 (codified as carried forward at 8 U.S.C. § 1401(b)).

under the Johnson O'Malley Act.[14] The State, unwilling to appropriate money to further the special needs of Native American children, allowed Native American education to deteriorate. In 1969, the Michigan Commission on Indian Affairs determined that illiteracy and drop-out rates were at alarming levels among Native American students. Furthermore, there were only twenty-three Native American students attending college in the State of Michigan during that year.[15]

Shortly thereafter, the Law School increased its efforts to fulfill the State's responsibility to Native American children by including Native American students in the first programs to achieve a diverse student body. These programs were precursors to the Law School's current affirmative action policy. As the above history demonstrates, this policy is constitutional because the State of Michigan has a compelling interest in fulfilling the federal government's trust responsibility to provide education to Native American students, a responsibility that was delegated over the past century, at least in part, to the State.

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[14] It was not until 1972 that Senator Robert Griffin spearheaded a successful effort to have the Interior Department order a policy change making Johnson O'Malley funds available to Michigan schools. Reinhardt, *supra*, at 78.

[15] At the same time, national studies indicated that states across the country were failing to provide Native American students with the educational opportunities guaranteed to them through treaties and the federal trust responsibility. *See generally* National Tragedy; NAACP Legal Defense and Educational Fund & Harvard University Center for Law and Education, An Even Chance, *reprinted in* 1971 Law & Soc. Order 245.

C. The State Of Michigan Has An Independent Interest In Educating Native American Students So That They Can Manage Complex Tribal Governmental And Business Affairs

Today, Indian tribes operate modern governments with complex legal, political and business interests that they must further through an educated citizenry, educated elected officials, and a skilled tribal governmental staff. Modern tribal governments must protect law and order on the reservation, *Talton v. Mayes*, 163 U.S. 376 (1896); *Wheeler*, 435 U.S. at 324-25, formulate taxation policies, *see Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195, 201 (1985); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 152 (1982), develop membership or citizenship rules, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978), maintain zoning and building code policies, *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989), protect their lands and natural resources, *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 330-33 (1983), and perform all of the other complex law-making and service tasks required of any other modern government. On the business and commercial side, Indian tribes increasingly have become involved in many modern business enterprises including commercial property development, *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribes*, 532 U.S. 411 (2001), manufacturing, *Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803 (7th Cir. 1993), mineral, oil, and gas development, *Montana v. Crow Tribe of Indians*, 523 U.S. 696 (1998), timber operations, *United States v. Mitchell*, 463 U.S. 206 (1983), and resort, recreation, and gaming development. *Mescalero Apache Tribe v. Jones*, 411 U.S.

145 (1973); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987); *Chickasaw Nation v. United States,* 534 U.S. 84 (2001). Conducting such modern governmental and commercial business requires highly trained lawyers, many employed directly by the Indian tribes.

There are twelve federally recognized tribes in Michigan. 67 Fed. Reg. 46,328. These tribes provide a host of governmental services to tribal members, who are also Michigan citizens. Additionally, as reservation economies develop, tribal governments are providing more and more services to non-members. The State has recognized that "[t]he state of Michigan and tribal governments share a responsibility to provide for and protect the health, safety and welfare of our common constituents" and "[t]hrough cooperation, state and tribal governments can achieve more for all of our citizens" Executive Directive 2001-2, Policy Statement on State-Tribal Affairs (Gov. John Engler, May 22, 2001). *See also* Government-to-Government Accord between the State of Michigan and the Federally Recognized Indian Tribes in the State of Michigan (Gov. John Engler, October 28, 2002) ("[t]his accord provides a framework for a government-to-government relationship that recognizes that the parties to this accord share a responsibility to provide for and protect the health, safety and welfare of their common citizens"). The State of Michigan therefore has a compelling interest in assuring that the tribal leadership, staff and citizenry are highly educated. The Law School's affirmative action policy is a constitutionally permissible means to achieve this compelling interest.

II. IN ADDITION, THE LAW SCHOOL HAS A COMPELLING INTEREST IN A DIVERSE STUDENT BODY

The *Amici* fully support the argument in the Respondent's principal brief that the pursuit of diversity in higher education is a compelling state interest. Therefore, the *Amici* seek only to supplement this discussion by identifying the specific tribal interests in a diverse student body.

Because Native American students are far more likely than non-Indian students to have interacted with tribal governments, they bring a unique perspective to law school classrooms that often is sorely lacking. Even though tribal governments are expressly referenced in the Commerce Clause of the United States Constitution, U.S. Const., Art. I, Sec. 8 Cl. 3, and federal Indian law cases are routinely heard in this Court,[16] tribal governments are rarely mentioned in the law school classrooms throughout the country, particularly in large mainstream first-year or other courses taken by most law students. The *Amici* simply invite the members of this Court to reflect on the number of times Indian tribes, tribal law, or tribal courts were ever mentioned during the course of their own legal education and the point becomes obvious. A recent survey of Civil Procedure professors further illustrates this point, as 87% of the respondents indicated that they did not even *mention* tribal courts in their class. Cynthia Ford, "Integrating Indian Law Into a Traditional Civil Procedure Course," 46 Syracuse L. Rev. 1243, 1252-53 (1996). Indian

[16] From 1986-2001, this Court has decided forty Indian law cases. David Getches, Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values, 86 Minn. L. Rev. 267, 280 n.56 (2001).

law issues are also typically ignored in other classes such as Constitutional Law, Property, and Federal Courts. *See, e.g.*, Frank Pommersheim, "Our Federalism" In the Context of Federal Courts and Tribal Courts: An Open Letter to the Federal Courts' Teaching and Scholarly Community, 71 U. Colo. L. Rev. 123, 129 (2000) (noting that a review of federal courts' text and casebooks "reveals the complete lack of any discussion of tribal courts within the federal system").

While a growing number of law schools, including the University of Michigan Law School, have begun to make up for this historic deficiency in legal education by offering (sometimes regularly and sometimes, like the University of Michigan Law School, occasionally) specialized courses in Indian law, many students who fail to enroll in such a course may get no inkling of the existence of Indian tribal governments, tribal law or tribal courts from the traditional law school curriculum.[17] Yet, as tribal business and governmental operations increase, more and more lawyers trained at the University of Michigan Law School and other public law schools find their clients dealing with Indian tribes.

The admission of Native American students to the University of Michigan Law School or any other law

[17] Forty-two law schools, or 23.8% of 176 accredited law schools in this country offer one or more courses on Indian law at least occasionally. Relatively few law students take advantage of these courses, however. Indian law courses are always elective; no law school requires a course in Indian law for graduation. 46 Syracuse L. Rev. at 1252-53. Without formal instruction, law students tend to have very limited knowledge about Indian people and Indian issues, much less Indian law. 46 Syracuse L. Rev. at 1256.

school, public or private, helps remedy this deficiency. Including Native American students within the Law School assures that many classes beyond any basic Indian law course will contain Native American students, many of whom will be familiar with and ready to raise the applicability of legal concepts discussed in the course to Indian tribes, tribal law, or tribal courts. This cross-pollination of ideas improves the quality of legal education for the entire school, not merely for Native American students in the class. Additionally, the presence of Native American students in law classes should encourage law professors to broaden the coverage of their courses to at least acknowledge, and, it is hoped, to teach about the existence of Indian tribal governments in many mainstream legal courses.

Additionally, although the Petitioner argues that the Law School's preferences for certain minority groups "rest on crude stereotypes," Petitioner's Br. at 16, the presence of meaningful numbers of Native American students in the classrooms and on campus actually create an opportunity to challenge the distorted images of Native American culture found in movies, literature, and other mediums, images that are most non-Indian students' only exposure to Native American culture. *See generally* Devon A. Mihesuah, *American Indians: Stereotypes & Realities* (1996) (discussing common Native American stereotypes); *First Person, First Peoples* (collecting narratives from Native American graduates of Dartmouth College, the majority of whom discuss their attempts to dispel the stereotypes attributed to them by their non-Indian peers). Native American student groups at the University of Michigan organize numerous events that are open to the campus

community and provide an invaluable opportunity for non-Indian students to learn about contemporary Native American culture. For example, the annual University of Michigan Dance for Mother Earth Pow Wow is a three-day campus event attended by thousands of students and community members each year.[18] Additionally, Native American students have brought attention to instances of stereotyping and misappropriation of Native American culture on the University campus by speaking out both inside and outside of the classrooms.[19]

Thus, in addition to fulfilling State interests in promoting Indian education, the admission of Native American students to the Law School under the University's affirmative action policies broadens and enriches the legal education of all students and may serve to enlighten the faculty, as well. This type of free exchange of ideas forms the very basis for any university.

[18] Other events organized by Native American students include daily activities and concerts during Native American Heritage Month each November, and "American Indian Law Day," a symposium sponsored by the Native American Law Students Association.

[19] For example, in 2000, Native American students organized a sit-in in the student union to protest a student group that had a long history of "playing Indian." In addition to several months of daily coverage in the University of Michigan newspaper, the *Michigan Daily*, the protest garnered national media attention. *See, e.g.*, David Goodman, University of Michigan students end 37-day sit-in, Associated Press, March 14, 2000; Robyn Meredith, Michigan Students Protest Campus Club's Indian Relics, N.Y. Times, February 13, 2000; Brian Ballou, Sit-in continues over secret group, The Detroit Free Press, February 21, 2000.

III. THE LAW SCHOOL ADMISSIONS POLICY IS NARROWLY TAILORED TO ACCOMPLISH THE STATE'S INTEREST IN EDUCATING NATIVE AMERICAN STUDENTS AND IN PROMOTING EDUCATIONAL DIVERSITY

Although the *Amici* do not concede that strict scrutiny is the proper test to be applied in this case, the Law School's admissions policy is constitutionally permissible even under this approach, because it is narrowly tailored to accomplish the compelling interests set forth above. Obviously, to accomplish the University's and the State's interests in providing educational opportunities to Native American children, the Law School must consider Native American status in its admissions decisions.[20] The Law School's affirmative action policy is narrowly tailored because it considers an applicant's race as only one of

[20] Although the University of Michigan could satisfy its compelling interest in honoring the Treaty of Fort Meigs by limiting its special admissions program specifically to descendants of the treaty tribes, accomplishing both the University's and the State's broader interests in an educated Native American citizenry and a diverse student body cannot be satisfied by a more narrowly tailored program. First, the federal government's responsibility for educating Native American youth is a general one not limited to specific treaty tribes. It is for this reason that the federal government has always chosen to discharge its responsibilities under a pan-Indian umbrella through federal Indian education programs. The State's interest is, in part, derived from the federal government's interest, and therefore can only be fulfilled by including all Native Americans in the Law School's special admissions programs. Second, achieving a truly diverse student body requires an admissions program that recognizes the amount of diversity *within* the Native American community. Native Americans live in all fifty states, speak over three hundred different languages, and the roughly 560 federally-recognized Indian tribes have vastly different tribal laws, governing structures, court systems and customs.

many factors (including grade point average, standardized test scores, geography, and life experiences) in its admissions decisions. Indeed, approximately two-thirds of African-American, Hispanic, and Native American students that apply are *denied* admission each year. Furthermore, the Law School's desire to enroll a "critical mass" of Native American students results in the matriculation of only a handful of Native American students each year.[21] If enrollment were to decrease below this amount, Native American students would feel completely isolated, and retention and recruitment would be impossible. Chalsa M. Loo & Garry Rolison, Alienation of Ethnic Minority Students at a Predominantly White University, 57 J. Higher Educ. 58 (1986). As such, the Law School's policy is sufficiently tailored to satisfy the strictest of scrutiny.

[21] The Petitioner argues that the Law School's focus on enrolling a "critical mass" of African-American, Hispanic, and Native American students, is "practically indistinguishable from a quota system," because the Law School was, in reality, seeking to ensure that a minimum of 10-12% of the enrolled class would consist of African-American, Hispanic, and Native American students." Petitioner Br. at 41. Evidence introduced at trial, however, demonstrated that in 1994, 19.2% of entering University of Michigan law students were African-American, Hispanic, and Native American, while those same minority groups comprised just 5.4% of the entering class in 1998. These widely divergent figures are not the result of a quota system. Furthermore, "a court [will] not assume that a university, professing to [use an admissions program which considers race only as one factor among many], would operate it as a cover for the functional equivalent of a quota system. In short, good faith would be presumed in the absence of a showing to the contrary. . . . " *Bakke*, 438 U.S. at 318-19 (Powell, J. concurring).

The Petitioner argues, however, that the Law School's policy is not narrowly tailored because: (1) it has no time limits on its use of racial preferences; and (2) race-neutral alternatives can achieve the State's goals. These contentions are easily refuted.

First, the Petitioner asserts that Law School's policy is not narrowly tailored because there are no time limits on its use of race in admissions decisions, as required by *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). Petitioner's Br. at 42. Although *Adarand* did state that a race-conscious program designed to remedy past discrimination must be limited so that it "will not last longer than the discriminatory effects it is designed to eliminate," this directive does not apply to an admissions program designed to facilitate Native American education. 515 U.S. at 238. Congress has long abandoned its policy of terminating federal-tribal relationships and has recognized that treaty rights and rights arising from the trust responsibility are continuing obligations. *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999) (Chippewa treaty-guaranteed off-reservation fishing rights survived later changes in federal policy). Therefore, in the context of Native American preferences, time limits are unnecessary.

Second, both the Petitioner and the United States, as *amicus curiae*, contend that the Law School's affirmative action policy is not narrowly tailored because race-neutral alternatives exist that could result in the enrollment of meaningful numbers of African-American, Hispanic and Native American students. Petitioner's Brief at 44. In particular, the United States dedicates nearly its entire *amicus* brief to the contention that the University of Michigan could obtain a diverse student body by simply

offering admission to the top 10% of graduating students at each high school. The accuracy of the United States' initial premise is questionable at best, *see* Catherine L. Horn & Stella M. Flores, Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences, The Civil Rights Project, Harvard University (2003), but even if one accepts this premise, the argument is easily dismissed.

To work at the graduate level, the United States' approach would require offering admissions to some percentage of college graduates at each undergraduate institution. This approach is unworkable because the Law School (which is actually one of the larger law schools in the country) only offers admission to approximately 1000 applicants each year. There is simply no way the Law School could maintain a student body of this size and still guarantee admissions to a particular percentage of graduates at each undergraduate institution.

Furthermore, even if there were some way to guarantee acceptance to a particular percentage of graduates at certain undergraduate institutions, this would not result in the admission of a critical mass of Native American students to the Law School. Although there may be predominately African-American or Hispanic colleges, Native American students are not concentrated in large enough numbers in undergraduate institutions so that meaningful numbers could be offered admission through any percentage plan. While 32 Tribal Colleges have been founded in the United States with the assistance of the Tribally Controlled School Grants Act of 1988, 25 U.S.C. §§ 2501-2511, only four of those offer a bachelors degree, and few students obtain such a degree. *See generally,* American Indian Higher Education Consortium, Tribal Colleges: An

Introduction (1999).[22] Therefore, the Petitioner's contentions are without merit and the Law School's affirmative action program should be upheld.

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[22] At present, no Tribal College offers a law degree. Thus, the federal government and the tribes must rely primarily on state and private institutions of higher learning to satisfy the important federal and tribal interests identified here. All too frequently, private institutions of higher learning are beyond the means of Native Americans, who must rely out of financial necessity primarily on state schools.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

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Respectfully submitted,

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